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In the

Supreme Court of the United States

October Term, 1960

No. 303

G. T. RUMMEL, MATTHEW P. ROWE, ROY M. EIDAL, M. M. HARDIN, doing business as "LA SALLE MINING COMPANY", a Partnership,

Appellants,

v.

WILLIAM E. MUSGRAVE, as County Assessor of Montrose County, Colorado; RUTH E. GAINES, as County Treasurer of Montrose County, Colorado; ORIN E. SMITH, FRED L. SULLIVAN and DON E. WATSON, as the Board of County Commissioners of Montrose County, Colorado; and TIM ARMSTRONG, State Treasurer of the State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF APPELLANTS OPPOSING APPELLEE'S MOTION TO DISMISS

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Appellees seek to show in their Motion to Dismiss that no substantial Federal problems are presented, and as a result this Appeal should be dismissed. Appellants submit that Appellees made admissions which not only point up the existence of substantial Federal questions, but which

emphasize the unconstitutionality of the tax levied against lands of the United States and assessed to Appellants as lessees of Federal property.

I. THE STATUTE AS APPLIED IS AN UNCONSTITUTIONAL TAX ON FEDERAL PROPERTY ASSESSED AGAINST APPELLANTS.

Appellees do not attempt to avoid the fact that the United States is, and at all times has been, the owner in fee simple of the land in question which the United States leased to Appellants as authorized by the 1946 Atomic Energy Act, Act of August 1, 1946, 60 Stat. 765. Appellees seek to show that the statute in question, Chapter 137-5-4, Colorado Revised Statutes 1953, does not levy a tax on lands owned by the United States; they also assert there is no substantial difference between the rights of the owner of an unpatented mining claim and of a lessee of the United States. Appellees do not explain how they reach the conclusion that the statute does not create a lien, and they ignore the provisions of Chapter 137-1-12, Colorado Revised Statutes 1953, defining real estate as including "all mines, minerals and quarries in and under the land and all rights and privileges appertaining thereto." Chapter 137-1-3, Colorado Revised Statutes, 1953, which makes taxes levied upon real estate a perpetual lien is likewise ignored. Rather, Appellees say, that inasmuch as this statute has been held to validly levy a tax against an unpatented mining claim, a tax may be levied against the lands of the United States leased to Appellants for mining purposes.

At all times since 1872 Congress has allowed citizens to locate mining claims upon public lands owned by the United States and which are not withdrawn from mineral entry. 30 U.S.C. 22. The rights which flow to the locator and owner of a mining claim so located have been definitely determined by this court in Ickes v. Virginia-Colorado Development Corporation, 259 U.S.639 where the Court said:

> "Restating the rule declared by many devisions, we said in Wilbur v. United States, 280 U.S. 306, 316, 74 L.Ed. 445, 449, 50 S. Ct. 103, that such a location,

perfected under the law, 'has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term'. It is alienable, inheritable and taxable."

The owner of a mining claim is the owner of private property in the fullest sense of the term. The fact the United States retains record title for the purpose of performing the ministerial act of granting a patent if application is made therefor by the owner, does not divest a mining claim of its character of private property in the fullest sense of that term. Thus, in Elder v. Wood, 208 U.S. 226, this Court sustained a tax levied under this same Colorado statute against an unpatented mining claim and also sustained the validity of a Treasurer's Deed issued for the nonpayment of taxes levied under the statute. The tax, being a lien on land, a Treasurer's Deed for non-payment of the tax was held to have been properly issued.

Appellees would, and do state to this Court, that the rights of the owner of an unpatented mining claim and those of Appellants, lessees of land owned by the United States in fee, are substantially the same. This statement and the force of the argument flowing therefrom, that if Colorado can tax the owner of private property it can, under the same statute, tax lands of the United States and compel a lessee of the United States to pay such tax must be examined. Because Colorado can tax privately owned property under the statute it does not follow that, proceeding under this same statute, it can levy a tax on Federally owned property. The United States is not the owner in fee of unpatented mining claims a mining claim is private property. The Federally owned land leased to Appellants remains the fee property of the United States. While there is no need to here contrast the rights of the owner of private property with those of a lessee of lands owned by the United States in fee even a cursory examination of the lease here involved (Record, Page 24 et seq.) points up basic differences. The owner of a mining claim is vested with a full, unrestricted property right. The locator owns the mineral deposits and may mine

them or not as he chooses. Appellants, lessees of the United States, have the duty to extract ore and deliver it to a receiving agent designated by the United States, which reserved to itself the right of property in all mineral deposits and to ores mined but not shipped. In Elder v. Wood, 208 U.S.226, this Court upheld the validity of a Treasurer's Deed issued under the same statute here involved, because of the non-payment of taxes. Elder v. Wood does not hold that taxes can be levied against lands owned in fee by the United States. This case emphasizes that this Colorado statute in fact does levy a tax and create a lien upon land. If this were not so a Treasurer's Deed conveying the title to the land could not have issued. If applied to the taxation of lands owned by the United States in fee, the statute is unconstitutional. The tax created by this statute is not a production tax nor an excise tax on ores produced. The tax in question is a tax on land, and as construed by the Supreme Court of Colorado is a tax on lands owned in fee by the United States. As long as this statute is applied to the taxing of privately owned property—a mining claim, patented or unpatented—it is valid. The extension and interpretation of this statute to the taxing of lands owned by the United States in fee contravenes the Federal Constitution and violates McCulloch v. Md., 4 Wheat 316, which case has continuously been approved and undoubtedly continues to state the law.

Because the Treasurer's Deed, issued for the nonpayment of taxes levied under the statute here in question on an unpatented mining claim which is privately owned property, was held valid in Elder v. Wood, does not mean that a tax can be levied against lands owned in fee by the United States. In fact the case of Elder v. Wood, supra, emphasizes the fact that this statute does create a lien on land. As applied to lands owned by the United States the statue is unconstitutional.

Appellees strongly rely upon and at great length cite Oklahoma Tax Commission v. Texas Company, 336 U.S.342. In that case the principal question before this Court was whether the lessee of mineral rights is allotted and restrict-

ed Indian lands was immunized by the Constitution against payment of a nondiscriminatory tax on petroleum produced from such lands. The land in question was held in trust by the United States and not owned in fee by the United States. There was no question before the Court as to the levying of a tax on lands owned by the United States. Congress, not having created an immunity prohibiting the taxation of oil produced by the lessees of such Indian lands, this Court upheld the right of the State of Oklahoma to levy an excise tax on petroleum produced from such lands. In this Appeal we are not confronted with a tax levied on ore produced from lands owned by the United States in fee, but this Appeal presents problems raised by a tax levied against lands of the United States for the nonpayment of which tax this Court has previously sustained the validity of a Treasurer's Deed.

The question presented by this Appeal is not whether the State of Colorado should or could levy an excise tax on ores produced from land owned by the United States in fee, or whether the State of Colorado should or could, as has the State of Michigan by statute approved in the Michigan cases[1] levy a tax against the lessee of tax-exempt real estate. The question raised by this Appeal is simply whether a tax can be levied against lands owned by the United States in fee and whether a lessee of the United States can be compelled to pay such tax.

Appellees confuse the property rights owned by the locator of a mining claim with those of a lessee of the United States. The locator of a mining claim has a property right which is real property. Appellants, as lessees of the United States, have a right which is a strictly limited leasehold right and which is personal not real property.

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[1]United States v. City of Detroit, 355 U.S.466, United States v. Township of Muskegon, 355 U.S.48.; City of Detroit v. Murray Corp, 355 U.S.489.

II. THE STATUTE DISCRIMINATES AGAINST THE UNITED STATES AND ITS LESSEES.

The question of discrimination was first injected into this case by the Colorado Supreme Court when that Court announced in its opinion that a state tax law might run afoul of the Constitution when parcels of property belonging to the same class are not taxed equally as required by due process of law, citing Phillips Chemical Company v. Dumas Independent School District, ... U.S....., 4 L.Ed. 2d.384. The fact remains that no statute of Colorado levies a tax upon the possessory rights of lessees of tax-exempt lands, whether the same be owned by the State, the United States, or by a tax exempt entity. As a result of the decision from which this appeal is taken, only lessees of the United States are taxed. The State of Colorado does not tax lessees of State-owned land, or of any tax-exempt entity.

CONCLUSION

For these reasons, and for the reasons set forth in the Jurisdictional Statement, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted.

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